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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. ~~1024-1025~~ 87-88

MIKHAIL NICHOLAS GORIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

HAFIS SALICH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

ISAAC PACHT,
DONALD R. RICHBERG,
SETH W. RICHARDSON,
Attorneys for Petitioner M. N. Gorin.

HARRY GRAHAM BALTER,
Attorney for Petitioner H. Salich.

CLORE WARNE,
Of Counsel for Petitioner Gorin.

WILLARD J. STONE, JR.,
Of Counsel for Petitioner Salich.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The above named Petitioners respectfully pray that a Writ of Certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled causes on April 22, 1940, affirming the judgments and sentences of the United States District Court for the Southern District of California.

INTRODUCTORY STATEMENT

These two cases present identical questions; the Petitioners were indicted and convicted together, and their appeals were disposed of by the Circuit Court of Appeals in one opinion. There is one Transcript of the Record to which references are hereafter made.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 710) is not yet reported. It is printed as an Appendix B to this Petition.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered April 22, 1940 (R. 736). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C. 347.)

QUESTIONS PRESENTED

The Petitioners were convicted on three counts of an indictment charging violations of Sections 1, 2 and 4 of the Act of June 15, 1917. (50 U.S.C. Sections 31, 32, 34.) The offenses charged related to espionage. The questions presented are (1) whether the admittedly wrongful acts of the defendants in revealing certain information in government files come within the criminal offenses specifically defined in the Espionage statute; or (2) whether they come within the criminal offenses which the government contends are defined in general prohibitions of the Espionage statute against disclosing information "connected with the national de-

fense" or "relating to the national defense"; or (3) whether the statute can be constitutionally construed, as it has been in the present cases, to make it a crime to reveal any information regarding anything which a jury might believe to be "connected with" or "relating to the national defense". Dependent upon the answer to these major questions are presented the incidental questions as to (1) whether the jury was properly instructed as to the law; or (2) whether the demurrers to the indictment should have been sustained; or (3) the Court should have directed a verdict in favor of defendants; or (4) whether upon the acquittal of Gorin's wife of the conspiracy charged the Petitioner-defendants must also be acquitted on the third or conspiracy count in the indictment.

STATUTE INVOLVED

The pertinent provisions of the Espionage Act (Title 50 U.S. C. Sections 31, 32, 34) are set forth in the Appendix A.

STATEMENT OF THE CASE

There is no substantial dispute about the facts constituting the alleged crimes for which Petitioners were convicted. Gorin is a citizen of the U.S.S.R. who, together with his wife, entered the United States on a passport in 1936 as a representative of Intourist, Moscow, to aid in the tourist business. He was employed by Intourist, Inc., a New York Corporation, which maintains an office at Los Angeles and had charge of that office. (R. 145.)

Salich was born in Russia; came to the United States

in 1923. After naturalization he served on the police force in Berkeley, California from 1930 to 1936 and began employment with the U. S. Naval Intelligence office on August 19, 1936. (R. 331.) He was employed as an investigator in the San Pedro office with the duty of collecting information and working on reports.

Gorin met Salich in 1938 and told him that he was interested in obtaining information about Japanese activities in that area for use in the event of trouble between Japan and Russia, but that Russia was friendly to the United States and he wanted no information that would be considered against the interest of the United States. (R. 169, 178, 336). Gorin said he was not interested in anything pertaining to the United States. Salich reported the suggestions of Gorin to his superior, Lieutenant Commander Roachefort (R. 337, 340, 135) and testified on the trial that he was instructed to keep up his contacts with Gorin, exchange harmless information and see what could be obtained in return. (R. 337).

Salich was in financial difficulties and as his acquaintance and contacts with Gorin increased, he accepted Gorin's offer of financial assistance, so that over a period from March to December 10, 1938, he received a total of $1700. from Gorin (R. 350, 360), which he stated he took as a loan to be repaid as soon as possible; but he did not inform his superiors that he was receiving money from Gorin.

When Salich was interrogated for the first time by the F. B. I. office on December 10, 1938, he talked freely of his relationship with Gorin, revealing all the information he had turned over to Gorin, seeking to excuse the impropriety of his acts by asserting that there was no

information in any way prejudicial to the United States. Salich had furnished information which came in part from the files and data of the Office of Naval Intelligence; he did not give Gorin any actual files or reports, but either oral information or typewritten notes. The reports can be classified as follows:

First: Reports concerning movements and activities of certain Japanese persons in this country, including civilians, military and naval officers, diplomatic and consular attaches, and civil or commercial representatives, some of whom were apparently suspected of espionage within the United States.

Second: Reports regarding suspected Japanese activities outside the United States, principally in Mexico and Mexican waters.

Third: Reports concerning certain alleged communists in the United States, whose activities were discussed.

There were no reports of any kind which in any way concerned or had any reference to the United States navy or army or any part of the naval or military establishment, or any place connected therewith, or anything whatever relating to the functioning, or means of functioning of the army or navy or any of the proscribed places or things specified in Section 31, of the Espionage Act.

The Opinion of the Circuit Court of Appeals definitely states:

> *"None of the reports contained any information regarding the army, the navy, any part thereof, their equipment, munitions, supplies of aircraft or*

*anything pertaining thereto.** One report named a number of Japanese 'suspected' of being interested in intelligence work. Most of them, on their face, appear innocuous, there being no way to connect them with other material which the Naval Intelligence may have, so that the importance of the reports does not appear." (See Appendix p. 27)

The free and full disclosures by Salich of his relations with Gorin and all that he did, eliminated any substantial issue of fact from the trial and none is presented or involved in this Petition.

There is, however, a very important issue of law as to the scope and constitutional construction of the Espionage Act. Upon this issue the trial court gave conflicting instructions and the Circuit Court of Appeals has expressly held that the law is in doubt and can only be settled by a ruling of the Supreme Court. The question presented, in brief, is: What are criminal offenses under the Espionage Act?

There is no question but that the acts of Salich, in revealing information of at least a semi-confidential character in the files of a government office, were wrongful; and the acts of Gorin in inducing such disclosures were wrongful. But since it would not be contended that any government employee could be convicted under the Espionage Act for improperly disclosing any of the contents of government files, the question presented by this case is: What disclosures of information are prohibited by the Espionage Act?

The trial court construed the law in two different ways and gave to the jury conflicting instructions—

* Italics throughout petition are ours unless otherwise indicated.

first instructing the jury that disclosures of information to come within the prohibition of the Act must be information relating to the places and things specifically enumerated in Section 1 of the Act; that is, information concerning vessels, aircraft, naval stations, dock yards, canals, etc. This instruction was in accord with contentions of counsel for the defendants. The Court of Appeals held that such instructions were erroneous, but since they were "favorable to Appellants they are in no position to allege error in that respect".

However, the trial court negatived the favorable character of these instructions by leaving the question wholly to the jury to decide as to whether the information obtained in this case "concerned, regarded or was connected with the National defense". This, the court held, was "a question of fact solely for the determination of this jury". (Appendix p. 32)

The dominant legal issue was presented to the Court of Appeals in the language of counsel for defendants, which was quoted by the court in the following sentences from its opinion:

> "It is urged that under such construction, the statute is unconstitutional because it 'would fix no immutable standard of guilt to govern conduct and would give no fixed and definite meaning * * * but would be subject to definition as to meaning by each court and jury'". (Appendix p. 37)

The Court of Appeals in its opinion reviewed the two lines of cases in the Supreme Court—those holding that broad terms in certain statutes were sufficiently definite to meet constitutional requirements and those

holding that the terms used in other statutes were too vague and indefinite. Then the court observed:

> "In logic, the statute here involved could be said to be analogous to some of the cases involved in the first group, and to be analogous to some of those involved in the second group. No workable statement of differentiation is apparent from these decisions. Apparently the question has been decided in the above mentioned cases on the basis of appeal of the contention to the court in each individual case rather than by measurement with a definite rule. Because of the doubt as to the controlling group of cases, we assume that the rebuttable presumption of constitutionality has disappeared. However, the result is controlled by the rule that 'It is incumbent * * * upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt'. Legal Tender Cases, 79 U. S. (12 Wall.) 457, 531. We hold that appellants have failed to carry the burden of proving unconstitutionality of the statutes involved." (Appendix p. 40.)

Thus it appears that convictions of Petitioners have been upheld by the Circuit Court of Appeals on the somewhat unusual basis that it is doubtful whether the Espionage Act can be constitutionally construed to define the crime for which they have been convicted. But since the doubt is not a doubt regarding what they did, but a doubt as to whether what they did is a crime, the convictions are upheld upon the assumption that

the Supreme Court will resolve the doubt as to whether they should or should not have been convicted by giving an authoritative construction to the Espionage Act. Regardless of the interests of present Petitioners, it can be submitted that under these circumstances a review of the issues in this case and an authoritative determination of the law is a matter of greatest public importance, particularly in a time such as the present, when it is gravely important that the law regarding espionage should be clearly defined so that, on the one hand, it may not be violated ignorantly, and, on the other hand, there may be assured punishment for those whose activities may be actually harmful to the United States.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In affirming the judgments and sentences of the District Court.

2. In failing to find error in the instructions of the District Court.

3. In upholding the constitutionality of the construction of the Espionage Act by the District Court.

4. In not holding that the District Court erred in permitting the jury to determine what information might be regarded as concerned or connected with the national defense, the disclosure of which would be in violation of the Espionage Act.

REASONS FOR GRANTING THE PETITION

The Espionage Act, under which Gorin and Salich were convicted makes it a crime (Sec. 31. Title 50 U.S.C.) for anyone to obtain information concerning "any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, *or other place connected with the national defense* . . . (etc.); or "to copy . . . any sketch, photograph . . . document writing or note of *anything connected with the national defense* . . . (etc.).

A reading of the entire Section (See Appendix) makes it clear that, under the lower court's construction of the Act, it is made a crime for *anyone* to obtain *any* information *anywhere* which a jury may believe is "connected with the national defense" or "relating to the national defense"—if the jury also believes that accused had the "intent or reason to believe that the information to be obtained is to be used to the injury of the United States *or* to the advantage of any foreign nation."

We submit that the Act cannot be held constitutional unless it is construed so as to make it a crime only to obtain information as to the places and things specifically listed in Sec. 31 as connected with or related to the national defense. Thousands of persons are constantly collecting and reporting information about matters which are more or less closely "connected with or related to the national defense"—such as, appropriations for military purposes; manufacturing capacity for military supplies; productive capacity and reserve supplies of metals and foods essential to national de-

fense; the numbers, equipment and condition of our armed forces; the financial strength and general economic condition of particular industries and of the country as a whole.

It must be evident that, while enormous quantities of such information are being freely collected and published in America, it cannot be lawful and praiseworthy for patriotic organizations, business men, and newspapers to use such information, for example, in criticisms of the government (which many a jury of twelve men might think injurious to the United States, or certainly "to the advantage of any foreign nation")—but at the same time a criminal offense for some foreign agent to obtain and transmit it to his government.

The Opinion of the Circuit Court of Appeals further explains the harmless character of the information disclosed in the present case, as follows:

> "One of the reports contained information regarding the activities of Japanese fishing boats, and of an acid said to have been deposited in salt water with which it reacted and caused a steel cable and a steel hull of a ship to be corroded through chemical action. This report was dated June 27, 1938. Practically everything which was contained in the report appeared in a printed periodical subsequently. (Ken Magazine, July 27, 1939.) *Other issues of the same periodical contained information of the same general nature as that contained in the reports.* (Ken Magazine, Vol. 1, No. 1, p. 40, April 7, 1938; Ken Magazine, April 6, 1939.)" (See Appendix p. 28.)

Our government is a *public* operation. Information

about all government activities, all information collected by the government and general information about matters of public concern, are open to public consideration *unless* by specific laws certain matters are defined as secret and disclosures are specifically prohibited.

There are obviously many matters connected with or relating to the national defense which should be kept secret. Perhaps all the files in the war and navy departments—all official information in these departments—should be kept secret except for disclosures expressly required or permitted by law.

But the truth is that the Congress has never been willing to enact such laws—even in time of war—because of the belief that public information and discussion of many matters connected with or relating to the national defense are essential to the *national defense of a free government.*

It is surprising to find no reference to the history of the Espionage Act in the Opinion of the Circuit Court of Appeals. In the brief of Petitioner-Appellant Gorin, extended consideration was given to the history of the Act and it was there shown that although the statute was passed in time of war there was a frequently expressed intention to avoid general terms and broad definitions under which too much power might be lodged with executive officials and too little information available to the public.

Among other things it was shown in this brief (pages 31-44) that a broad definition of the term "national defense" was stricken out of the bill by the Conference Committee and the specific list of places and things now in Sec. 31 was added for the reason explained by the Conference Committee as follows:

"Section 1 sets out the places connected with the national defense to which the prohibitions of the Section apply, while a similar provision of the House bill designates such places in general terms". (Conference Report H. R. 65, 65th Congress, 1st Session.)

Also the Conference report explained significantly the addition of another Section (now Section 36), which provides in part as follows:

> "The President in time of war or in case of national emergency may by proclamation designate any place other than those set forth in subsection (a) of section one hereof in which anything for the use of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purposes of this title; Provided, That he shall determine that information with respect thereto would be prejudicial to the national defense."

The Conference Report said about this Section:

> "It was adopted because of the changes made in Section 1 and for the further reason that Section 1202 of the House Bill, which gave the words 'national defense' a broad meaning, was stricken out."

The legislative history of the Espionage Act therefore shows that changes in the Act as it passed the House were deliberately made for the very purpose of preventing the Act from being given such a broad construction as it has now received.

As previously pointed out, the trial court partially accepted the construction of the Act now urged on the

basis of its history, but then negatived the value of the early instructions to the jury by leaving it wholly to the jury to determine whether the information disclosed in this case "concerned, regarded or was connected with the national defense" and also instructed the jury that it was *not* essential "that the documents or information alleged to have been taken necessarily injure the United States or benefit any foreign nation". So the defendants were tried and convicted on the theory that the Espionage Act defined it to be a crime (and constitutionally could define it to be a crime) if any person should obtain any information which a jury might believe to be connected with or relating to the national defense, if the informant or procurer had reason to believe that the information would be "to the advantage of a foreign nation", regardless of whether it was to be used to the injury of the United States.

There are two vital objections to any such construction of the Espionage Act:

First: The Act need not be so construed and in the light of its history ought not to be so construed.

Second: If the Act were so construed, it would be unconstitutional because it would be impossible for anyone to obtain or disclose information regarding matters which are well known and publicly discussed throughout the United States, without the risk of being convicted of a felonious crime, if a jury should believe that such information was connected with or related to the national defense and was obtained or disclosed to the advantage of some other nation.

The necessary brevity of this Petition will not permit a review of the two lines of cases summarized in the Opinion of the Circuit Court of Appeals, but two quota-

tions from leading cases will make Petitioners' contention quite clear.

"Therefore, because the law is vague, indefinite, and uncertain and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is unconstitutionally invalid, and that the demurrer offered by the defendant ought to be sustained".

United States v. Cohen Grocery Company, 255 U. S. 81.

"No one may be required at peril of life, liberty and property to speculate as to penal statutes. All are entitled to be informed as to what the state commands or forbids. * * * And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning, and differ as to its application, violates the first essential of due process of law".

Lanzetta v. New Jersey, 306 U. S. 451.

CONCLUSION

We submit that the Opinion of the Circuit Court of Appeals, printed in the Appendix, amply demonstrates the need for a review in this case and for an authoritative construction of the Espionage Act by the Supreme Court. The Opinion makes a fair statement of the facts and fairly states the doubts of the court as to whether the Act as construed in the lower court would be constitutional.

We submit that the Act can be construed as a constitutional enactment and that such a construction should be given to it. It is evident, however, that under such a constitutional construction the defendants could not and should not have been convicted. They were entitled to have a verdict directed in their favor because of insufficiency of evidence to show any violation of the Act properly construed.

In concluding our Petition we should emphasize that we are not seeking to exculpate Petitioners of any wrong-doing or to suggest that it might not be made an offense to reveal confidential information in government files.* But we have here a case where information taken from government records was admittedly of such a harmless character that the man obtaining and the man revealing it would be justified in assuming themselves innocent of any criminal offense.

Violation of Sec. 31 of the Espionage Act is punishable by fine or imprisonment for more than two years or both. Violation of Section 32 is punishable by imprisonment for not more than twenty years, except that in time of war it may be punishable by death, or by imprisonment for not more than thirty years. Felonies so punishable should certainly be clearly defined. Petitioner Gorin received a sentence of six years on each of two counts; and Salich received a sentence of four years on each of two counts; the sentences in both cases to run concurrently.

Even if one felt that their wrongful acts should be punished, notwithstanding the fact that no injury was done to anyone and no harm to the interests of the

* U. S. Naval Regulations prohibit such disclosures; but significantly do not refer to any criminal penalties for violation of this prohibition.

United States, nevertheless the admitted action of Salich in notifying his superior officer when he was first approached, and his subsequent conduct, all show clearly that he, as a trained government employee, familiar with the provisions of the Espionage Act, could have had no idea that he was violating the Act and committing a felony, which would subject him to the practical certainty of a heavy prison sentence. That which he did was not defined as a crime by any law made plain to "men of common intelligence".

There is the gravest danger, not only to unintentional law-breakers but to the public generally, in defining offenses of this character in such vague terms that in times of stress and public excitement large numbers of persons may be subjected to criminal prosecutions for actions which heretofore had been regarded as either minor derelictions or entirely innocent exercises of a citizen's right to know how his government is being carried on. The correct and constitutional construction of the Espionage Act, therefore, presents an issue of great public importance which we believe merits the consideration of this Court. Wherefore, we submit that the petition for writ of certiorari should be granted.

Respectfully submitted:

ISAAC PACHT,
DONALD R. RICHBERG,
SETH W. RICHARDSON,
Attorneys for Petitioner M. N. Gorin.
HARRY GRAHAM BALTER,
Attorney for Petitioner H. Salich.

CLORE WARNE,
Of Counsel for Petitioner Gorin.
WILLARD J. STONE, JR.,
Of Counsel for Petitioner Salich.

APPENDIX A

Sections 1, 2 and 4 of Espionage Act. (Sections 31, 32, 34, Title 50 U. S. C.

Section 31:

"*Unlawfully obtaining or permitting to be obtained information affecting national defense.* Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section 36 of this title; or (b) whoever for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue

print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or (c) whoever, for the purpose aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts or induces or aids another to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this title; or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, wilfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or wilfully retains the same and fails to deliver it on demand to the officer or employee of the United States, entitled to receive it; or (e) whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, shall be punished by a fine of not more than $10,000, or by im-

prisonment for not more than two years, or both. (June 15, 1917, c. 30. Title I, Sec. 1, 40 Stat. 217.)"

Section 32:

"*Unlawfully disclosing information affecting national defense.* Whoever, with the intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: Provided, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with,

or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years. (June 15, 1917, c. 30, Title I, Sec. 2, 40 Stat. 218.)"

Section 34:

"*Conspiracy to violate preceding sections.* If two or more persons conspire to violate the provisions of sections 32 or 33 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by section 88 of Title 18. (June 15, 1917, c. 30, Title I, Sec. 4, 40 Stat. 219.)"

APPENDIX B

OPINION OF THE CIRCUIT COURT OF APPEALS

APRIL 22, 1940.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MIKHAIL NICHOLAS GORIN, *Appellant*, vs. THE UNITED STATES OF AMERICA, *Appellee*.	No. 9135
	Apr. 22, 1940
HAFIS SALICH, *Appellant*, vs. THE UNITED STATES OF AMERICA, *Appellee*.	No. 9136

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division.

Before: GARRECHT, HANEY and HEALY, Circuit Judges.

HANEY, Circuit Judge.

Appellants challenge judgments and sentences rendered against them after conviction on three counts of an indictment. The first count charged violation of §1 of the Act of June 15, 1917, Ch. 30, 40 Stat. 217 (50 USCA §31); the second count charged violation of §2 of that act (50 USCA §32); and the third count charged viola-

tion of §4 of that act (50 USCA §34). Generally speaking, these offenses relate to espionage.

One branch of the Navy service is the Naval Intelligence Office. Headquarters for the Eleventh Naval District are at San Diego, the intelligence office there being in charge of a District Intelligence Officer. A branch office is located at San Pedro and is in charge of an Assistant District Intelligence Officer. The investigators employed at the San Pedro office make their reports orally or in writing. The Assistant District Intelligence Officer then digests and evaluates the information and dictates the report to the Chief Yeoman—a secretarial employee. The latter, in writing the report on the typewriter, makes an original, three yellow copies and one green copy. These reports are numbered consecutively. One yellow copy and one green copy are retained in the San Pedro office and the remaining copies are sent to the San Diego office.

Appellant Salich was born in Moscow, Russia, on May 24, 1905, and lived there until 1917, when he moved with his parents to Kazen which is about 700 miles east of Moscow. He then went to Manchuria in 1920, to Yokohama, Japan, 1921, and to the United States in 1923. He became a naturalized citizen of the United States, and was employed by the Berkeley Police Department as an active officer from July 1, 1930 until August 15, 1936. In 1935, Salich met one Aliavdin, Vice Consul for the Union of Soviet Socialist Republics (hereafter called the Soviet Union) in San Francisco, and thereafter saw him a number of times. In 1936, Salich made an application for a position with the United States Naval Intelligence Office. A letter from San Diego, dated August 10, 1936, advised Salich of his

appointment, and he reported for work in San Pedro on August 19, 1936. At that time one Davis was District Intelligence Officer and one Roachefort was Assistant District Intelligence Officer. Salich thereafter saw Aliavdin in Los Angeles. Aliavdin knew that he was working for the Naval Intelligence Office.

Salich was an investigator and reported the results of his investigations to the Assistant District Intelligence Officer. He was expected to read the yellow copies of the reports which were kept in the Chief Yeoman's desk, in order to be familiar with the progress of investigations.

Appellant Gorin and his wife are citizens of the Soviet Union, and arrived in this country on January 10, 1936, under a passport issued by the Soviet Union. He then testified before a Board of Special Inquiry that he was to be employed in the Entourist Department of the Amtorg Trading Corporation, his salary to be paid by the Russian government through such corporation. His work was the organization of tourist parties from America to the Soviet Union. He was stationed at Los Angeles. Roachefort instructed Salich to contact someone in the Soviet Consulate regarding the activities of a Soviet official named Kaganovich in July or August, 1937. Salich eventually contacted Gorin and had a conversation with him. Later during that year Gorin called at Salich's home, in the latter's absence, and told Salich's wife that he had a letter for Salich. A day or so afterward, Salich called at Gorin's home, found him busy, but saw him two or three days later, when he received the letter, written by Aliavdin introducing Gorin to Salich. At this meeting Gorin mentioned his interest in matters pertaining to Japanese activities and Japa-

nese activities only. Salich told Gorin that he did not believe that he had any information which would be of benefit to anyone.

Salich reported the conversation to Roachefort. There was testimony that Roachefort ordered Salich to refrain from contacting Gorin. Salich testified that Roachefort told him to give Gorin such information as could be found in newspapers and periodicals, and try to obtain information from Gorin concerning the Japanese consulate. At any rate, after subsequent meetings and in March, 1938, Salich agreed to supply Gorin with certain information, on the theory that whatever information concerning the Japanese he gave to Gorin, it would benefit the United States as against the "common" enemy.

Davis was replaced as District Intelligence Officer on May 13, 1938 by one Zacharias. Roachefort was replaced as Assistant District Intelligence Officer on June 1, 1938.

Salich was in financial straits owing to marital difficulties and accepted a total of $1,700 from Gorin for the information supplied to Gorin. Salich testified that the money received by him was considered a loan. Salich gave to Gorin the substance of the information contained in some 43 reports as related in the yellow copies previously mentioned.

On September 30, 1938, a salesman for a dry cleaning establishment took a suit belonging to Gorin, and in a pocket of the suit the salesman found an envelope containing a sheet of paper and a $50 bill. The sheet of paper contained some typewriting and other writing. The salesman took the envelope to the Hollywood Police Station where a copy of the paper was made. The en-

velope and its contents were then given to Gorin's wife who had called at the cleaning establishment for it.

On December 10, 1938, several agents of the Federal Bureau of Investigation called at Salich's apartment and told him that they were making an investigation concerning information which he was supposed to have given Gorin. Salich agreed to, and did go to the office of the agents where he stated what he had done and identified the reports, the substance of which he had communicated to Gorin. The following day, Salich made a written statement containing some of the matters related above. Included in the statement was the following:

> "Conscientiously and honestly I did not think that my actions, aside from being highly unethical, were inimical to the best interests of the United States, to which country I am extremely grateful for what it did for me and which country's citizenship I value * * *
>
> "I sincerely state that at no time did I furnish Gorin any information which in my opinion would harm this country; on the contrary, I saw some reason to Gorin's argument that we had common cause, and by helping them I would also be indirectly helping our own cause * * * "

The reports mentioned above were not physically given to Gorin. Salich communicated the substance thereof to Gorin orally or in writing. The reports consisted principally of a relation of the movements of certain Japanese from one place to another, and activities thereof, such as photography, conferences and other matters. A few reports dealt with Japanese activities

in Mexico, Mexican waters and Central America, and a few reports concerned alleged communists and their activities. None of the reports contained any information regarding the army, the navy, any part thereof, their equipment, munitions, supplies or aircraft or anything pertaining thereto. One report named a number of Japanese "suspected" of being interested in intelligence work. Most of them, on their face, appear innocuous, there being no way to connect them with other material which the Naval Intelligence may have, so that the importance of the reports does not appear.

As illustrative of the information contained in the reports, we quote the report to Gorin made by Salich, found in Gorin's suit by the cleaning establishment's salesman:

"George Ohashi, of San Diego, is reported to have made a statement at a JACL meeting that he was not a fascist. Couple other members, Paul Nakadate and George Suzuki took esception to this remark and accused George Ohashi of being a communist and subsequently beat him up.

"Ohashi and his wife own a beauty shop in San Diego which was found burglarized one day and the place searched.

* * * * * * * * *

"Dr. M. M. Nakadate is dentis and is brother of Paul Nakadate.

"Their father is Y. Nakadate who lives in San Diego and who is listed in our cards as "radical"—pro-Japanese." Dr. N. M. Nakadate is borne in

1910; is member of United States Naval Reserve in dental corps and in 1935 did some training duty on board the USS Dorsey which is a destroyer. After completion of his sea duty he was attached to aviation unit of USNR, but because of his Japanese descent, it is evident, he is not being encouraged to continue his career with USNR.

"Bert Simmons a civilian employee on North Island, San Diego, which island houses Naval aviation. He was reported as a communist.

"The report, however, comes from a private watchman employed by Nick Harris Private Patrol. This watchman holds a dishonorable discharge from the Navy and it is believed that he made the report to ingratiate himself with the Navy. Report turned over to San Diego for further action."

One of the reports contained information regarding the activities of Japanese fishing boats, and of an acid said to have been deposited in salt water with which it reacted and caused a steel cable and a steel hull of a ship to be corroded through chemical action. This report was dated June 27, 1938. Practically everything which was contained in the report appeared in a printed periodical subsequently.[1] Other issues of the same periodical contained information of the same general nature as that contained in the reports.[2]

The indictment was filed on January 11, 1939. The first count thereof charged Salich, Gorin, and the lat-

[1] Ken Magazine, July 27, 1939, p. 9.

[2] Ken Magazine, Vol. 1, No. 1, p. 40, April 7, 1938; Ken Magazine, April 6, 1939.

ter's wife with copying, taking, making and obtaining documents, writings and notes of matters connected with the national defense, and describing the reports above mentioned. The second count charged defendants with communicating, delivering and transmitting to Gorin as a representative of the Soviet Union writings, notes, instruments and information relating to the national defense, and describing the same reports mentioned in the first count. The third count charged that the defendants conspired to communicate, deliver, transmit, and attempt to communicate, deliver and transmit to the Soviet Union and to a representative thereof, documents, writings, plans, notes, instruments and information relating to the national defense.

Each of the defendants demurred to the indictment, the demurrers all being overruled. Each of the defendants pleaded not guilty.

The trial court's instructions were comprehensive. As to the first count, the trial court instructed the jury that there were four elements to the crime therein charged: (1) the fact of taking or obtaining must be established; (2) there must be a purpose of obtaining information respecting the national defense; (3) there must be an intent or reason to believe that the information so obtained was to be used to the injury of the United States or to the advantage of the Soviet Union; (4) the information so taken must, in fact, relate to the national defense.

The detailed instructions regarding the first two of these elements added little. As to the third element, the court below instructed the jury that appellee must "prove either an intent or a reason to believe that the information was to be used either to the injury of the

United States or to the advantage of" the Soviet Union; that the law would be satisfied if appellee proved "beyond a reasonable doubt that both Salich and Gorin had reason to believe that the information disclosed was to be used to the advantage of" the Soviet Union. The court also instructed the jury that they could consider the character of the information required, as to whether or not it was susceptible to use by the Soviet Union, and whether or not Salich knew facts from which he concluded, or reasonably should have concluded that the information could be used advantageously by the Soviet Union. The court below also charged the jury that if "there was no intent and no reason to believe on the part of either" Salich or Gorin, that "in so exchanging information that there would result an injury to the United States or advantage to" the Soviet Union, then the defendants must be acquitted.

As to the fourth element of the first count, the trial court instructed the jury that it was not required

> "* * * that the documents or information alleged to have been taken necessarily injure the United States or benefit any foreign nation. The document need not in fact be vitally important or actually injurious. The document or information must be, however, connected with or related to the national defense."

The court also instructed the jury as follows:

> "You are instructed that the term 'national defense' includes all matters directly and reasonably connected with the defense of our nation against its enemies. The first lines of defense naturally are the men, the ships and guns of the navy, the

men, the planes and the guns of the air corps, and the men, forts and guns of the army. Behind these—but none the less necessary if the army and navy are to be kept in the field in wartime or well prepared in peacetime—are those places and things which are essential to the storage of reserves, the inter-communication of armed forces, the transportation of war supplies, the reconditioning of warworn materials and men, and the manufacture of war supplies * * *

"You are instructed * * * that for purposes of prosecution under these statutes, the information, documents, plans, maps, etc., connected with these places or things [mentioned in the statute] must directly relate to the efficiency and effectiveness of the operation of said places or things as instruments for defending our nation * * *

"You are instructed that in the second place the information, documents or notes must relate to those angles or phases of the instrumentality, place or thing which relates to the defense of our nation * * *

"You are, then, to remember that the information, documents or notes, which are alleged to have been connected with the national defense, may relate or pertain to the usefulness, efficiency or availability of any of the above places, instrumentalities or things for the defense of the United States of America. The connection must not be a strained one nor an arbitrary one. The relationship must be reasonable and direct.

"Whether or not the information, obtained by any defendant in this case, concerned, regarded or

was connected with the national defense is a question of fact solely for the determination of this jury * * * ".

The detailed instructions under the first count also contained many examples to further explain the last element. The elements of the crime charged in the second count were stated by the court below: (1) the fact of disclosure must be proved; (2) the disclosure must be made to representatives or citizens of the Soviet Union; (3) the guilty intent or reason to believe that the information so obtained was to be used to the injury of the United States or to the advantage of the Soviet Union must be present; (4) the information so taken must, in fact, actually relate to the national defense. The detailed instructions as to each of these elements adds nothing to what has been related.

The court below instructed the jury to return a verdict that Gorin's wife was not guilty of the crimes charged in the first two counts. The jury acquitted Gorin's wife on the third count and convicted Gorin and Salich on all three counts, both of whom appealed from the judgment and sentence entered on the verdict.

The indictment is based on the Act of June 15, 1917, Ch. 30, 40 Stat. 217.[4] It was entitled "An Act To punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes" and was divided into thirteen titles. The first title consisted of nine sections and is headed with the word "Espionage". All three counts of the indictment are based on provisions in the first title of the act.

[4] See also: 34 USCA §1200, Article 4 "Fourth" and Article 5.

Section 1 of the act, on which the first count was based, provides in part:

> "That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation * * * (b) * * * copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense * * * shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both."

Section 2 of the act, on which the second count was based, provides in part:

> "Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government * * * or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national de-

fense, shall be punished by imprisonment for not more than twenty years * * * "

Section 4 of the act, upon which the third count is based, provides as follows:

> "If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy * * * "

Section 2 also provided for increased penalties for violation thereof in time of war. Section 3 provided a crime for commission of acts only in time of war.

CONSTRUCTION OF THE ACT.

Appellants contend that the words "respecting the national defense" and "connected with the national defense" as used in §1, and the words "relating to the national defense" as used in §2, should be given a military and naval connotation, and that they should be limited in their application to the places and things specifically enumerated in §1 of the act. To properly understand the contention it should be noted that §1(a) of the act, which is not in question here, makes it a felony to obtain information "concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, tele-

graph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored * * * " The contention is, in effect, that the words just quoted define "national defense", so that when §1(b) forbids the copying of a "document, writing, or note, of anything connected with the national defense", it forbids such copying only if the document, writing, or note relates to or concerns a "vessel, aircraft, work of defense", etc. as enumerated in §1(a).

To support the contention it is argued that §§1 and 2 are found in Title 50 of the United States Code entitled "War" and was therefore intended to apply only to persons who spy on the United States; that the rule of *ejusdem generis*, the legislative history, and grammatical incidents require such construction; and that any uncertainty in the act must be construed in favor of appellants.

We think the contention is untenable. "The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture". Thompson v. United States, 246 U.S. 547, 551. See also: Helvering v. City Bank Co., 296 U.S. 85, 89. It seems apparent beyond doubt, that §1 of the act specifies five different and separate crimes. Each

crime is defined in a subsection ending with a semicolon and preceded by a designation consisting of a letter contained in parentheses. Each is as separate as it would be if made a separate section in the act. There is no room for the application of rules of construction. None of these subsections refers to another. Nowhere is an intent manifested that "national defense" was actually defined in §1(a) or in any other subsection. In view of the plain meaning, we are not warranted in restricting the meaning of the words "national defense". Unquestionably, the words were used in a broad sense with a flexible meaning. That meaning accords with the rule that "unless Congress has definitely indicated an intention that the words should be construed otherwise, we must apply them acording to their usual acceptation." Avery v. Commissioner, 292 U.S. 210, 214. We think there is here no definite indication that a restricted meaning was intended.

What is or is not "connected with the national defense" is a question of fact for the determination of the jury. Like many words, what is meant by the use thereof may change from time to time. For example, the operation of an automobile in a particular way twenty years ago might have been negligence then, but not negligent now in view of the changes which have occurred since. So, particular things which were once "connected with the national defense" may have lost such connection. For example, the plans for making a muzzle-loading flintlock might have been at one time "connected with the national defense" but it is difficult to understand how it would be today when they are no longer used.

As in most jury cases, a question of law is present,

i.e., whether the jury would be justified in inferring from the evidence that the fact existed.

We are not in accord with what may be said to be a contrary view as expressed in the instructions, where it is indicated that the information must relate to the places mentioned in subsection (a) of §1. However, since the instructions as given were favorable to appellants, they are in no position to allege error in that respect.

CONSTITUTIONALITY OF THE STATUTE

It is urged that under such construction, the statute is unconstitutional because it "would fix no immutable standard of guilt to govern conduct and would give no fixed and definite meaning * * * but would be subject to definition as to meaning by each court and jury". Violation of the Fifth and Sixth Amendments by the statute is urged. The Fifth Amendment prohibits deprivation of a person's life or liberty "without due process of law" and the Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right "to be informed of the nature and cause of the accusation".

Certain phases of the act have been considered, and the constitutionality thereof upheld. Schenck v. United States, 249 U.S. 47; Frohwerk v. United States, 249 U.S. 204; Abrams v. United States, 250 U.S. 616, 619. It is not at all clear that the questions raised here are open to decision, in view of the broad language of O'Connell v. United States, 253 U.S. 142, 147-148 and Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 409-410. However, in view of the fact that different sections of the act were involved in those cases, we will assume

that the questions have not been definitely decided by the Supreme Court.

The so-called general rule relied on here, is stated in Connally v. General Const. Co., 269 U.S. 385, 391, as follows:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with the ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law * * *"

As early as United States v. Brewer, 139 U.S. 278, 288, it had been said that "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid". These rules, however, are subject to the same mischief which they seek to control, and do not aid in the solution of the question urged here. That conclusion necessarily follows the fact that many criminal statutes must be and are construed notwithstanding there are doubts as to their meaning. The rulings in particular cases must be considered.

The following statutes have been held sufficiently definite,* denouncing contracts and arrangements "reasonably calculated" to fix and regulate the price of com-

* See also: Fox v. Washington, 236 U.S. 259, 277; Whitney v. California, 274 U.S. 357.

modities, and prohibiting acts which "tend" to accomplish the prohibited results;[5] prohibiting certain things which "prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade";[6] requiring a proprietor or keeper of hotel, in case of fire, to "do all in their power" to save guests;[7] prohibiting sheep owner from permitting sheep to graze on any cattle range previously occupied by cattle, or upon any range "usually" occupied by any cattle grower as range for his cattle;[8] prohibiting sales of meat falsely represented as "kosher" or as having been prepared of a product "sanctioned by the orthodox Hebrew religious requirements";[9] requiring the quantity of the contents of a package to be marked on the outside thereof, provided that "reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations";[10] and authorizing a state officer to "mutualize or reinsure the business of" an insurance company "or enter into rehabilitation agreements".[11]

On the other hand, the following statutes have been held too vague and indefinite: prohibiting the enhancement by combinations of the cost of any article above its "real value" which was construed to mean "market value under fair competition, and under normal market conditions";[12] providing that it was unlawful for any person willfully to make any "unjust or unreasonable

[5] Waters-Pierce Oil Co. v. Texas (No. 1), 212 U.S. 86, 109.
[6] Nash v. United States, 229 U.S. 373, 376.
[7] Miller v. Stahl, 239 U.S. 426, 431.
[8] Omaechevarria v. Idaho, 246 U.S. 343.
[9] Hygrade Provision Co. v. Sherman, 266 U.S. 497, 501.
[10] United States v. Shreveport Grain & El. Co., 287 U.S. 77.
[11] Neblett v. Carpenter, 305 U.S. 297, 303.
[12] International Harvester Co. v. Kentucky, 234 U.S. 216; Collins v. Kentucky, 234 U.S. 634, 638.

rate or charge" in handling or dealing in or with any necessaries;[13] requiring payment to state employees of the "current rate" of per diem wages in the "locality" where the work is performed;[14] providing that it was not unlawful to market products at a reasonable profit" by agreement or association, which could not otherwise be so marketed;[15] and declaring that a person not engaged in any lawful occupation, "known" to be a member of any "gang" who had been convicted of a crime was a "gangster".[16]

In logic, the statute here involved could be said to be analogous to some of the cases involved in the first group, and to be analogous to some of those involved in the second group. No workable statement of differentiation is apparent from these decisions. Apparently the question has been decided in the above mentioned cases on the basis of appeal of the contention to the court in each individual case rather than by measurement with a definite rule. Because of the doubt as to the controlling group of cases, we assume that the rebuttable presumption of constitutionality[17] has disappeared.[18] However, the result is controlled by the rule that "It is incumbent * * * upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt". Legal Tender Cases, 79

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[13] United States v. Cohen Grocery Co., 255 U.S. 81.

[14] Connally v. General Const. Co., 269 U.S. 385.

[15] Cline v. Frink Dairy Co., 274 U.S. 445, 456.

[16] Lanzetta v. New Jersey, 306 U.S. 451.

[17] Borden's Co. v. Baldwin, 293 U.S. 194, 209.

[18] Del Vecchio v. Bowers, 296 U.S. 280; N. Y. Life Ins. Co. v. Gamer, 303 U.S. 161, 170-171; Department of Water and Power, v. Anderson, 9 Cir., 95 F(2d) 577, 583.

U.S. (12 Wall.) 457, 531. We hold that appellants have failed to carry the burden of proving unconstitutionality of the statutes involved.

We add that the words of the statutes "national defense" are similar to the words "common defence" as used in §8, Article I of the Constitution.

THE EVIDENCE

Appellants contend that the court erred in failing to direct a verdict in their favor, because of insufficiency of evidence. The applicable rule is that if there is substantial evidence to support the charges, then a peremptory instruction of acquittal should not be made, but it is a question for the jury to determine whether "the effect of the evidence was such as to overcome any reasonable doubt of guilt". Pierce v. United States, 252 U.S. 239, 251-252. Likewise, the effect and weight of the fair inferences to be drawn from the evidence for appellee is for the jury. Gunning v. Cooley, 281 U.S. 90, 94.

It is urged that the Naval Intelligence reports show on their face that they do not relate to the national defense. We think the contention cannot be sustained. It is unnecessary to state what inferences were properly deducible from all the reports. It is sufficient to consider one which is favorable to appellee. One of the reports named a number of Japanese "suspected" of being interested in intelligence work. The jury could properly infer, we think, that it is highly important to the Navy to know possible spy suspects, and that it is vital that the foreign government be ignorant of the Navy's knowledge, because if such government was aware of the Navy's knowledge, it would, conceivably,

replace such agents with others, or direct them to cease their activities and employ others. It is likewise inferable that if the agents were aware of the Navy's knowledge they would take steps to hide any activity which might lead to their arrest and eradication. It is obvious that the detection of spies is important in the event of war, as shown by the extreme penalty meted out for such offense. We think the jury could properly conclude from these inferences that the report "related" to the national defense.

It is also urged that intent consists of two elements, i.e, will and knowledge, and that while there was evidence of will, there was no evidence that appellants knew these reports "related" to the national defense, or that their acts were unlawful. Whatever refinement in the definition of intent can be made, it is clearly not controlling here. The statute does not require unconditionally an intent, for in the words of the statute "reason to believe" is said to be sufficient. The trial court properly so instructed. Considering the source of the information divulged, and the desire of Gorin to obtain it, we think the jury could properly infer that appellants had reason to believe that such information was "to be used to the injury of the United States, or to the advantage of" a foreign nation.

Error in the admission of the testimony of Commander Zacharias is also alleged. Zacharias was District Intelligence Officer, and a superior of Salich. His testimony was to the effect that he had specifically instructed Salich not to divulge any information. The court carefully instructed the jury that whatever Zacharias said was not to be taken as any statement of law, and that they should consider only the law com-

municated to them by the trial court. As so limited we see no error in the admission of the evidence. The proof was pertinent because it had a bearingon Salich's "reason to believe".

It is also asserted that the exclusion of the Ken Magazine article was error. It is said that such article discloses that the information conveyed to Gorin was well known to the public and not confidential matters. While a serious question might arise in a case where the only information divulged was such as could be found in newspapers or periodicals available to the public, such question does not arise in this case, because the article in the periodical does not, and does not purport to relate all information contained in the reports in question. Assuming, without so deciding, that it was error to exclude the article insofar as it had a bearing on the same information contained in some of the reports, the record affirmatively discloses that the error was not prejudicial because the information in the other reports is not contained in the article. See Lynch v. Oregon Lumber Co., 9 Cir., 108 F(2d) 283, 285-286.

We are, of course, conscious of the argument which could be made that the information divulged must not be of any importance or the Naval Intelligence Office would not have made the information available to the public by presenting the reports in evidence. Such procedure was a necessity in order to try the case. Whether it is sound, we think, is a question for the determination of Congress.

THE INSTRUCTIONS

The court's instrution as to the "national defense" is challenged, but we find no error therein except as

stated above. It is urged that the instruction left it to the jury to speculate whether the information related to the national defense. As previously stated, we think the question is one of fact, and the decision thereof by the jury gives rise to no more or different speculation than the decision by a jury of any other fact question.

Finally, it is contended that the court erred in failing to give a requested instruction to the effect that if the jury acquitted Gorin's wife of the conspiracy charge, they must also acquit appellants, because if appellants conspired to convey the information to a representative of a foreign government, then there was no proof of anyone receiving the information from the transmitters.[10] The judgment and sentence of the court makes it unnecessary to consider this contention. Gorin received a sentence of six years on the third count and six years on the second count, the terms to run concurrently. Salich received a sentence of four years on the third count and four years on the second count, the terms to run concurrently. It is therefore immaterial whether the judgments and sentences on the third count were right or wrong. Brooks v. United States, 267 U.S. 432, 441.

Affirmed.

(Endorsed:) Opinion. Filed Apr. 22, 1940. Paul P. O'Brien, Clerk.

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[10] Appellants rely on: United States v. Katz, 271 U.S. 354; United States v. Dietrich, C.C. Neb., 126 F. 664; United States v. New York, etc. R.R. Co., C.C. N.Y., 146 F. 298.

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